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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

NO. _____

PATRICK KELLY ANDREW,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DATED: May 19, 1983

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QUESTIONS PRESENTED

I. UNDER THE AGUILAR-SPINELLI RULE MUST INFORMATION PROVIDED BY UNIDENTIFIED AND INTERESTED INFORMANTS BE SHOWN TO BE RELIABLE AND/OR CORROBORATED BY OTHER DETAIL, AND BASED UPON PERSONAL OBSERVATION OR KNOWLEDGE, BEFORE SUCH INFORMATION CAN BE USED TO SUPPORT ISSUANCE OF A SEARCH WARRANT?

II. DOES A MAGISTRATE VIOLATE THE PROSCRIPTIONS OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION WHEN HE AUTHORIZES THE SEARCH OF A HOUSE UNDER THESE CIRCUMSTANCES:

(1) AN UNIDENTIFIED, UNTESTED INFORMANT ADVISES A POLICE OFFICER THAT HE OR SHE HAS BEEN TOLD BY AN UNIDENTIFIED PERSON, ABOUT WHOM NOTHING IS KNOWN, THAT A DRUG

TRANSACTION OCCURRED AT A HOUSE AT A GIVEN ADDRESS, AND

(2) THAT POLICE OFFICER PASSES THAT INFORMATION ON TO ANOTHER POLICE OFFICER WHO, FOR REASONS KNOWN ONLY TO HIMSELF, DECIDES THAT THE INFORMANT WAS TALKING ABOUT A HOUSE AT ANOTHER ADDRESS, AND

(3) THE LATTER POLICE OFFICER PASSES THE MODIFIED INFORMATION ON TO THE AFFIANT WHO SEEKS AND OBTAINS A WARRANT TO SEARCH THE HOUSE NOT DESCRIBED BY THE INFORMANT?

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OCTOBER TERM, 1982

PATRICK KELLY ANDREW,

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v.

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The Petitioner, PATRICK KELLY ANDREW, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on March 23, 1983.

OPINION BELOW

The opinion of the Court of Appeals (Wright, Choy and Skopil, JJ.) (Appendix C, infra) is not reported.

PARTIES TO THE PROCEEDINGS

There are no parties to the proceedings other than those named in the caption to this petition.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 23, 1983. There was no petition for rehearing filed. Jurisdiction of this Court is invoked under the provisions of Section 1254(1) of Title 29 of the United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment Four

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment Five

"No person shall be. . . deprived of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

Jurisdiction of the District Court and Court of Appeals

Jurisdiction of the District Court was predicated upon Section 3231 of Title 18 of the United States Code. Jurisdic-

tion of the Court of Appeals was predicated upon Section 1291 of Title 28 of the United States Code.

Statement of Proceedings Below

Following petitioner's arrest on October 8, 1981 (the computer printout indicates October 9, 1981), he was arraigned in the United States District Court for the Northern District of California on Information No. CR 81 0409 SW(SJ). Petitioner's arrest had been the direct consequence of the execution of a search warrant issued by Federal Magistrate Nordin F. Blacker on October 7, 1981. A copy of the search warrant and supporting affidavit consisting of 5 pages is attached hereto as Appendix A.

The sufficiency of the affidavit supporting the search warrant was attacked in a motion to suppress filed on December 17, 1981. The government's

answer to the motion was filed on January 20, 1982, and the matter was argued briefly before Judge Williams on February 3, 1982. Petitioner filed a supplemental argument on February 11, 1982. There was no evidence adduced at the hearing on the motion, and there was no effort made to traverse the warrant.

On April 2, 1982, Judge Williams made his order denying the motion to suppress. A copy of Judge Williams' order denying petitioner's motion to suppress is attached hereto as Appendix B. The order refers to a search warrant executed on June 2, 1980. The focus of defendant's motion was a warrant executed some sixteen months and six days later, but petitioner assumes that Judge Williams was in fact ruling upon the validity of the search

of petitioner's residence on October 8, 1981.

Petitioner waived his right to a jury trial and on May 26, 1982, the matter was tried before Judge Williams on a stipulated set of facts. During the trial, the government introduced into evidence over petitioner's objection, those items seized from petitioner's residence on October 8, 1981 and which defendant had unsuccessfully sought to have suppressed. Judge Williams found the petitioner guilty of all counts charged in the information and, on August 25, 1982, sentenced petitioner to a term in federal prison.

On September 2, 1982, petitioner Andrew filed his notice of appeal to the Court of Appeals. On March 1, 1983, the panel of WRIGHT, CHOY AND SKOPIL affirmed petitioner Andrew's conviction. A

copy of the Memorandum of Decision of that panel is attached hereto as Appendix C.

STATEMENT OF FACTS

On or about October 7, 1981, Officer Jeff Ouimet of the San Jose Police Department and assigned to the Federal Drug Task Force sought and obtained from Federal Magistrate, Nordin F. Blacker, a search warrant commanding the search of petitioner's place of residence at 12110 Blake Lane, San Jose, California. The execution of the search warrant on October 8, 1981 resulted in the discovery and seizure of certain laboratory equipment, certain schedule II controlled substances and two firearms. Petitioner was arrested at the scene of the search and, in an information filed on November 5, 1981, was charged with violations of

21 United States Code §841(a) (1), 18 United States Code §924(c) and 18 United States Code App. 1202(2) (1).

Petitioner Andrew moved to suppress the evidence seized at his place of residence. Petitioner's suppression motion was predicated upon his contention that the Ouimet affidavit should not have been deemed by the magistrate to provide him probable cause to believe the property described by Ouimet was concealed at 12110 Blake Lane, San Jose California. Judge Williams heard, and denied, the suppression motion. Judge Williams ultimately tried the case and found petitioner Andrew guilty on all counts. As he had done before the District Court, petitioner Andrew, in his appeal to the Court of Appeals, challenged the sufficiency of the affidavit supporting the search warrant

that led to the entry into his home and the seizure there of controlled substances, laboratory equipment and firearms. Andrew contended that the affidavit fell short of satisfying constitutional requirements in at least two respects: neither the so-called "Four Corners" test nor the "Two-Pronged" Aguilar vs Texas test was satisfied.

ARGUMENT

1. The "Four Corners" Test

Petitioner Andrew's position with regard to the "Four Corners" test is this: The affidavit of Officer Ouimet, (see Appendix A) states that affiant talked to San Jose Police Officer Luna who talked with San Jose Police Officer Luca. Luna told the affiant that Luca told Luna that "X", an untested informant, told Luca that an unnamed party told

"X" that methamphetamine was being manufactured in a house on Cherry Avenue in San Jose, California. A reading of the affidavit provides absolutely no insight as to the identity or reliability of the unnamed party from whom the unidentified "X" allegedly got the methamphetamine manufacturing story.

There is no question but that an affidavit may be based upon hearsay information. Jones vs. United States, (1960) 362 U.S. 257, 4 L.Ed 2 697, 78 ALR 2d 233. The affidavit is not necessarily defective if the information is double hearsay. The hearsay in the subject affidavit is hearsay (unnamed party) upon hearsay (untested, unidentified "X") upon hearsay (Luca) upon hearsay (Luna). Perhaps the most precise information attributed to "X" is that the place the unnamed party said was being used for the manufacture

of methamphetamine was located on Cherry Avenue, San Jose, California.

The affidavit of Officer Ouimet provides no basis for the conclusion that Luna ever talked to "X". It simply states that Luna decided that the house "X" told Luca was Cherry Avenue was in fact 12110 Blake Lane. There is no reason to conclude that Luna took Luca to the 12110 Blake Lane address, or that either Luna or Luca took "X" to that address. For some reason left unsaid in the affidavit, Luna decided that the untested informant was wrong.

It was the position of the government at the District Court level that the shifting of the focus from Cherry Avenue to Blake Lane was no problem because "the location of Blake Lane is a judicially noticeable fact..." The salient point, however, is that there is abso-

lutely no way of knowing what the magistrate did. As was pointed out below, perhaps the magistrate could have looked at a map of San Jose and located Blake Lane. There is simply no way of knowing what Magistrate Blacker considered, or was asked to consider, outside the four corners of the affidavit presented to him. That information could have been obtained, or might have come to his attention despite its non-existence within the affidavit, does not mean that it was obtained or in fact came to his attention. The "four corners" rule was developed to prevent cases from being decided upon the very type of speculation that the government asked Judge Williams to indulge in when considering the motion to suppress.

The "four corners" rule, which dates back at least fifty years in the Ninth Circuit, provides "[A]ll data necessary

to show probable cause for the issuance of a search warrant must be contained within the four corners of a written affidavit given under oath." United States vs. Anderson (1971) 9th Cir. 435 F.2d 174, 175. In Anderson, the magistrate interviewed a United States postal commissioner and put a portion of what the commissioner told him into an affidavit for the commissioner to sign. The portion of what the commissioner told the magistrate but which the magistrate failed to put into the affidavit for the commissioner to sign would have been enough to give probable cause for the issuance of the warrant. The Anderson Court, however, stated that the affidavit itself must show a "self subsisting ground for the issuance of the warrant." A thorough examination of the Ouimet affidavit leaves unanswered the question

of how the unnamed person's story to "X" about illegal activity on Cherry Avenue provided the magistrate with probable cause to believe those alleged illegal activities were being carried on at the Blake Lane address. If in fact, Blake Lane adjoins Cherry Avenue, how the magistrate could possibly have been aware of that fact remains a puzzle a year after he issued the subject search warrant.

The Court of Appeals, acknowledging that it did not know how the police concluded that the informant really meant Blake Lane when "he" said Cherry Avenue, concluded that the "four corners" test had been satisfied. It is interesting that the Court of Appeals also concluded that the informant was a male which is not supported in the affidavit and is contrary to the open-court description of the informant by the prosecuting at-

torney. The Court of Appeals said that the informant "sufficiently pinpointed the location, regardless of the incorrect street designation," because "he" said the house was located in an orchard area--this is the Santa Clara Valley that "he" was talking about--off the Almaden Expressway on the same side of the street as the Robertsville carwash. The distinguishing feature of the house on Cherry Avenue, according to the informant, was the American flag on the pole next to the house. The Officer (Luna) who talked to the affiant apparently never talked to the informant and never saw an American flag. He saw a pole next to a house on Blake Lane. To "pinpoint" is "to locate and identify precisely." The American Heritage Dictionary of the English Language (1973 Edition), page 996. One frequently hears the phrase that "close

only counts in horseshoes." It would be unfortunate if "close" were allowed to count in search warrants, but the Court of Appeal, in concluding that Andrew's house on Blake Lane was "sufficiently pinpointed" (read "located and identified precisely") may help popularize such a phrase. Little of substance will be left of the Fourth Amendment's protection if this Court supports that conclusion.

If for no other reason but that there is no justification whatsoever for the shift of the focus from Cherry Avenue to Blake Lane, the petition for a writ of certiorari should be granted. There is however another, equally valid, reason for granting the writ. As petitioner Andrew contended before the Court of Appeals, the affidavit of Ouimet failed to meet the probable cause requirement established by Aguilar vs. Texas 1964 378

U.S. 100, 114, 115, 12 L.Ed.2d 723, 729, 84 S. Ct. 1059, and Spinelli vs. United States (1969) 393 U.S. 410, 21 L.Ed.2d 637, 89 S. Ct. 584.

2. The Two-Pronged Aguilar Test

The United States Supreme Court directed the application of a two-pronged test of the sufficiency of a search warrant's underlying affidavit in the leading case of Aguilar vs. Texas, supra. It said:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, Jones vs. United States, 362 US 257, 4 L.Ed.2d 697, 80 S. Ct. 725, 78 ALR 2d 233, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see Rugendorf vs. United States, 376 US 528, 11 L.Ed.2d 887, 82 S. Ct. 825, was 'credible' or his information 'reliable.'"

(a) Credible Informant/Reliable Information

As was pointed out earlier, the Ouimet affidavit is predicated in large measure upon hearsay, the source of which is several times removed from the affiant (i.e., the unnamed purchaser of drugs tells the unidentified "X," who enjoys some familiarity with drugs, and who tells Luca who tells Luna who tells Ouimet that methamphetamine was being manufactured at a certain place). Can the veracity of this informant "X" or the reliability of his information be established from the affidavit?

Petitioner concedes that even though "X" is described as "untested" in Ouimet's affidavit, the law provides that his credibility can be established "indirectly." Spinelli vs. United States (1969) 393 US 410, 21 L.Ed.2d 637, 89 S. Ct. 584.

But what do we know now, or what did Magistrate Blacker know on October 7, 1981, about the credibility of the untested "X"? We know only that "X" was familiar with methamphetamine, that he associated with someone who participated or claimed to have participated in drug traffic, and that something apparently motivated "X" to tell all to Officer Luca. In connection with the assessing of "X's" credibility, it is interesting to note that "X" remains insulated in the Ouimet affidavit not only because he or she remains unidentified. Further insulation is provided because the only wrongdoing "X" claims to have witnessed (i.e., the possession of methamphetamine) is attributed completely to his or her male or female phantom companion. "X," according to Ouimet, made no declarations against penal interest when describing his or her

visit to the Cherry Avenue house. The well-established rule, articulated by the United States Supreme Court in United States vs. Harris (1971) 403 US 573, 29 L.Ed. 723, 91 S. Ct. 2074, that declarations against penal interest can be persuasive to one trying to determine the credibility of an informant or the reliability of his statement, does not help "X" one whit.

Trying to assess the reliability of the information that reportedly came from the companion of "X" to "X" and ultimately found its way to Magistrate Blacker is like trying to get a firm grip on jello. A discussion regarding corroborating elements to be gleaned from the affidavit will follow, but the fundamental question of what information there was to corroborate remains. In this regard, it should be borne in mind that "X," according to

the Ouimet affidavit, did not enter the residence he or she unequivocally said was on Cherry Avenue; "X" simply "waited in a car in the driveway" while his or her mysterious drug-trafficking companion entered the house. That companion allegedly told "X" that methamphetamine was being manufactured in the house on Cherry Avenue. The players in the Cherry Avenue drama are all mysterious. The reader of Ouimet's affidavit knows nothing more than the one mystery person told another mystery person that methamphetamine was being manufactured in the Cherry Avenue house. Petitioner concedes that the magistrate need not know the age or sex of an informant before he can issue a valid search warrant. Perhaps it is not significant that, for all that Magistrate Blacker might have discerned from reading Ouimet's affidavit, "X" may have been five years old. Perhaps it is not significant that

"X" may have been the estranged wife, or husband, of "Pat," (See Appendix A, page 2, paragraph 2), who may have been male, female, young, old, present or absent when "X's" companion entered the house of Cherry Avenue. What is significant is that Magistrate Blacker was presented with an undetailed "casual rumor circulating in the underworld" (Spinelli, supra), and with the assistance of innocuous information elevated it to "probable cause."

The informant in Spinelli, supra, was not unlike "X" in the sense that the Spinelli informant had never seen Spinelli at work and had never placed a bet with him. "X" stayed in a car in the driveway of the Cherry Avenue residence and could have had no personal knowledge of what, if anything, went on inside the house.

Judge Williams of the District Court in his order (See Appendix B) denying the

motion to suppress, adds some things to the "X" story that simply do not exist within the four corners of Ouimet's affidavit. Judge Williams mistakenly moves the affiant closer to the source of damaging hearsay by taking Officer Luca out of the picture. Judge Williams stated that "'X' told Officer Luna that he and a friend had gone to a house where his friend had purchased methamphetamine." (See Appendix B, page 3). Not only could "X" not have had personal knowledge that "his friend had purchased methamphetamines," (see Appendix B, page 3), but "X" never talked to Officer Luna, according to the affidavit. This mistake takes on some significance because Luna is the one who concludes that "X," with whom Luna never spoke, meant Blake Lane when he said Cherry Avenue. Further, Judge Williams states in his order that "X" was

told by his companion "that a man named 'Pat' was in the house." (See Appendix B, page 3). In fact, the "Pat" information is not attributed to "X's" companion but to "X" who says neither that "Pat" is a man nor that "Pat" was in the house. (See Appendix A). In fact, according to the affidavit, "X" told Luca that a person named "Pat" lived at the house.

While pointing out the differences between what the affidavit says and what Judge Williams stated it says may seem like nitpicking, those somewhat subtle differences do give the "X" information a little more weight than it enjoys within the four corners of the affidavit. Stripped of those subtle changes, the "X" information is on a par with that provided by the Spinelli, supra, tipster. "Pat" was not necessarily a man (later traslated into "Patrick Andrew" by Officer Ouimet) and "Pat" was not necessarily in

the house on Cherry Avenue when "X's" mysterious companion was. The only fair way to characterize the subject information (i.e., that an unidentified person told an untested, unidentified informant that he or she had purchased methamphetamines at a house where a person named "Pat" lived) is that it was a "casual rumor circulating in the underworld." Spinelli, supra. Raising the question of when "Pat" may have lived in that house underscores the vagueness of "X's" information and the fairness of the above characterization.

The Court of Appeals agreed that the Ouimet "affidavit did not directly satisfy the Aguilar elements of reliability and credibility. The informant saw the methamphetamine after his friend had bought it, but he had no direct knowledge that the drug came from the house." (See Appendix C, page 2). The Court of Appeals

then addressed, in a very superficial manner, the second-prong of the Aguilar test.

(b) Underlying Circumstances/ Corroboration

Under United States vs. Larkin (1974 9th Cir.) 510 F.2d 13, the corroborating elements relied upon to establish the reliability of the untested informant's tip must be more than "minor or innocuous" elements. Even when viewed in a light most favorable to the government, the corroborating elements do not rise above the level of "minor or innocuous."

The elements relied upon by Ouimet include "an American flag on a pole next to the house" (see Appendix A, page3), which "X" specifically told Officer Luca was on Cherry Avenue, San Jose. Four days after "X" allegedly parked in the driveway of a house on Cherry Avenue, Officer Luna viewed a house on Blake Lane

with a flag pole next to it (nothing said about an American flag) and decided "X" did not mean Cherry Avenue when "he" said Cherry Avenue. Ouimet said nothing about having observed a flag pole and, more importantly, nobody, ("X", Luca, Luna or Ouimet) said anything about the proximity of Blake Lane to Cherry Avenue. The affidavit contains no explanation of why Luna determined that "X" made a mistake when "he" told Luca that the house "X's" companion claimed was being used for the manufacture of methamphetamine was located on Cherry Avenue.

The fact that "X" told Luca "that a person by the name of 'Pat' lived in the house" (See Appendix A. page 3), added little or nothing to the affidavit. Again, "X" was talking about a house on Cherry Avenue. How "X," who did not enter the house, knew that a person by the name of "Pat" lived there is totally unclear.

Whether "X" meant that "Pat" was reported to be in the house on Cherry Avenue when "X's" companion entered the house, or that "Pat" had lived in that house months or years before, is also totally unclear. Whether "Pat" was male or female could not have been ascertained by the magistrate studying Ouimet's affidavit. "X's" statement to Luca about "Pat" then, added nothing to the factual data presented to Magistrate Blacker.

The Court of Appeals in a discussion which appears to be a blend of both prongs of the Aguilar test, ascribed some significance to the fact that the "Informant's tip included also the information that 'Pat' lived there, and it specified the date of the transaction." (See Appendix C) Aside from the vitally important fact that "there" was Cherry Avenue, according to the informant, and not Blake Lane, it is significant that the "transaction" was not

witnessed by the informant. There is no statement in the affidavit about the reliability of "X's" companion who allegedly is the source of the information about the "transaction" and "Pat" living at the Cherry Avenue address. See Spinelli vs United States, supra, 393 US at 416 ("Moreover, if the informant came by his information indirectly, he did not explain why his sources were reliable.") Thus, unlike the situation in Jones vs United States, supra, or United States vs Harris, supra, the salient hearsay portion of the instant warrant affidavit is not based upon personal observations of the informant.

The fact that Ouimet learned from Luna, who learned from a Deputy Robbins, that a car parked in the driveway of 12110 Blake Lane was possibly owned by one Kenneth Martin even though it was registered to Martin and Suzanne S. Jarret, and that

Kenneth Martin "had been previously convicted for manufacturing methamphetamine" (see Appendix A, page 4), added little or nothing to the affidavit. The affidavit made it clear that Robbins was speculating ("...he felt..." that Martin Jarrett was Kenneth Martin), and even if Robbins' "feeling" was correct, nothing was said about when Martin suffered the conviction. For all Magistrate Blacker could have determined from Ouimet's affidavit, the conviction could have occurred twenty years earlier. It is interesting that Ouimet "viewed a criminal record from the Federal Bureau of Investigation" (see Appendix A, page 4), which would have specified the date of Martin's conviction, and apparently chose not to enlighten Magistrate Blacker of the type of "drug charges" Patrick Andrew had been convicted of, or when. If, for example, Patrick Andrew had been convicted in 1965 of pos-

session of less than an ounce of marijuana, would that "corroborating element" have added much to Magistrate Blacker's store of knowledge? If the conviction had been for a more serious charge and of a later vintage, would not the officer seeking the warrant have been more specific? Again, it is interesting to note, as with the Kenneth Martin situation, that Ouimet viewed the criminal record and apparently chose not to be at all specific.

The United States Supreme Court stated:

> We do not hold that the officer's knowledge of the petitioner's physical appearance and previous record was either inadmissible or entirely irrelevant upon the issue of probable cause. [Citations] But to hold that knowledge of these facts constituted probable cause would be to hold that anyone with a previous record could be arrested at will.
>
> Beck vs. Ohio (1964) 379 US 89, 97, 13 L. Ed. 2d 14s, 149, 35 S. Ct. 2223.

Under the Beck rule, neither the Martin conviction nor Patrick Andrew conviction gave Magistrate Blacker the probable cause he stated he was "satisfied" existed. Putting the two convictions together did not move Magistrate Blacker any closer to probable cause because both bits of information lacked specificity, particularly with regard to time.

The hearsay observations ascribed to Officer Bob Meheula added very little, if anything, to the information presented to Magistrate Blacker. According to Ouimet, Meheula told Ouimet (1) that in the vicinity of 12110 Blake Lane he smelled an odor "similar to the medicinal type of odor found in a hospital" (see Appendix A, page 4); and (2) that he had "never seen the drapes open at 12110 Blake Lane" (see Appendix A, page 4), for several months.

There are two tests relative to the

significance of an order in narcotics cases that were laid down in the case of Johnson vs. United States (1948) 333 US 10, 12, 92 L.Ed. 436, 440, 68 S. Ct. 367: (1) is the person identifying the odor qualified to know the odor; and (2) is the odor sufficiently distinctive to identify a forbidden substance? The Ouimet affidavit fails both tests.

For all that Magistrate Blacker could have ascertained from the Ouimet affidavit, Officer Meheula could have worked for three months for the San Jose Police Department. He may have spent those three months investigating bicycle thefts. There was absolutely no basis provided in the affidavit for the conclusion that Officer Meheula had any expertise at identifying the odor in question. Indeed, Meheula is alleged to have told Ouimet that he "was not sure if it was ether that he smelled," just that it was a "medicinal"

smell. (See Appendix A, page 4). Ouimet's statements regarding the role of Meheula raise several questions. Is the odor of ether "sufficiently distinctive to identify a forbidden substance" as required by Johnson, supra? Is the "medicinal smell" described by Meheula "sufficiently distinctive to identify a forbidden substance" as required by the Johnson court? Is 12110 Blake Lane, San Jose, in a residential area? Does it border on an industrial area? The dictionary tells us that ether is "widely used in industry." The American Heritage Dictionary of the English Language (1973 Edition, page 450.) We know that, according to the government, Magistrate Blacker could have taken, even though he was not requested to do so and there is no evidence that he did take, judicial notice of the location of Blake Lane. Are we also to assume that Magistrate Blacker judicially noticed that

Blake Lane was an exclusively residential area where some signficance might be attached to the ordor of what may or may not have been ether? Add to this vagueness the fact that whatever odor the unqualified Officer Meheula noticed he noticed only once (and that a month before the warrant was sought) and the distance by which the Ouimet affidavit falls short of passing the Johnson test becomes even more apparent.

It is interesting that one of the energy conservation tips Pacific Gas and Electric Company spends tens of thousands of dollars disseminating was used by Officer Ouimet as one of the details to corroborate "X's" story. The occupant of 12110 Blake Lane keeping his or her drapes shut during July, August and September is consistent with the occupant having a concern about privacy. It is consistent with the occupant desiring to keep the sun off

the furniture and carpeting. It is consistent with a desire to keep the house cool during the summer months without using an air conditioner. Whatever other significance it may have had in Ouimet's mind is not clear. What is clear is that the perfectly innocent and understandable act of keeping one's drapes closed ought not to provide any part of the basis for the issuance of a search warrant.

Paragraph nine of the Ouimet affidavit makes it abundantly clear that there was no observable evidence of criminal activity at the Blake Lane address. Officer Ouimet took great pains to explain to Magistrate Blacker that he could not observe any activity whatsoever at the address that Officer Luna decided "X" must have been talking about to Luca. Affiant Ouimet added a total lack of activity at 12110 Blake Lane to a list including such portentous items as drapes being kept

closed and a once only, month old, largely unidentified smell and asserted to Magistrate Blacker that that strange mixture of "facts" corroborated "X's" story and produced "probable cause."

Just how ludicrous it is to ascribe significance to "non-events" such as failure to open drapes and failure to show any sign of life around 12110 Blake Lane is pointed up by the Ouimet reference to the black object, "cylindrical in shape," protruding from the roof. (See Appendix A, page 4). If the "black object" was a vent (Ouimet does not say that it was a vent, yet the Court of Appeals stated that "the officer observed that the house had an unusually large vent on the roof."), and if it was as prominent as Ouimet describes it as being, would not placing such a telltale sign in clear sight on the roof be at cross-purposes with keeping drapes closed and showing no signs of life? Could the

magistrate reviewing these "facts" in an affidavit not reasonably conclude that the occupant of 12110 Blake Lane was not trying to cover up a thing?

There is simply no way that the so-called corroborating elements, viewed separately or in combination with one another, lent any substance whatsoever to the casual rumor allegedly started by "X's" companion.

CONCLUSION

The United States Consititution provides that there shall be no violation of the right to people "to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures." It provides further that "no warrants shall issue, but on probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

United States Constitution, Amendment IV.

It may well be that the personal observations of affiant were presented fairly and accurately to Magistrate Blacker. It may well be that the hearsay, with which the Ouimet affidavit was replete, was fairly and accurately presented to Magistrate Blacker. A fair and accurate presentation of personal observations and hearsay, however, does not add to its probative value. There were no signficant facts presented by Officer Ouimet to Magistrate Blacker within the four corners of the affidavit which could have given Magistrate Blacker probable cause for believing the occurrence of a crime and the secreting of evidence in 12110 Blake Lane, San Jose, California. Unlike Officer Ouimet, who was and no doubt still is engaged in the laudable but often competitive enterprise of ferreting out crime and criminals, Magistrate Blacker should have viewed the

affidavit's "facts" in a neutral, detached and objective fashion. Mindful of the important role he must play if the Fourth Amendment's proscription against unreasonable intrusions into the sanctity of the home is to be safeguarded, he should have asked Officer Ouimet some basic questions. Magistrate Blacker, mindful of the fact that there was no evidence of any kind of activity, let alone criminal activity, at 12110 Blake Lane, should have asked where Blake Lane was in relation to Cherry Avenue. He should have asked if "X" had been brought to the vicinity of 12110 Blake Lane to confirm that when he or she said Cherry Avenue he or she meant Blake Lane. His failure to ask those very basic questions, and his direction to search 12110 Blake Lane when he was presented with no evidence that those premises contained what Ouimet guessed they might, represented an abdication of his proper

role as a magistrate. Officer Ouimet, not Magistrate Blacker, decided that the right of privacy must yield to the "right" of search. Upholding a search pursuant to a warrant issued under those conditions is tantamount to saying that the Fourth Amendment does not mean what it says.

Even assuming, as petitioner Andrew has done, that Judge Williams had in fact directed his attention to the warrant issued well over a year after the one he referred to in his order (Appendix B), his ruling denying petitioner's motion to suppress was clearly erroneous. The conviction of petitioner was the direct consequence of the issuance and upholding of a search warrant which fails any and all constitutional tests applied to it.

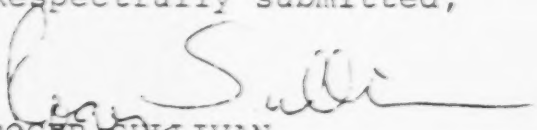
This Court should grant review of the search issue raised at the District Court and Court of Appeals levels by Patrick Andrew; the issue is fundamentally basic,

of extreme importance to a meaningful appellate process, and, because of assumptions made below that were not warranted by the facts presented in the subject affidavit, has been ruled upon erroneously thus far.

For the above reasons, the petition for a writ of certiorari should be granted.

DATED: May 19, 1983

Respectfully submitted,



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Counsel for Petitioner
ANDREW

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

NO._____

PATRICK KELLY ANDREW,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

CERTIFICATE OF FILING AND SERVICE

ROGER SULLIVAN, a member of the bar of this Court, certifies that pursuant to Rule 28 of this Court, he filed and served the within Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, with the Clerk of this Court, and on counsel for respondent, respectively, by depositing said petition, and copies thereof, in the

United States Mail at Santa Cruz, California on May 20,1983 and June 7, 1983, postage prepaid, within the time allowed for filing. Service was made upon counsel for respondent at the following address: HONORABLE REX LEE, SOLICITOR GENERAL OF THE UNITED STATES, DEPARTMENT OF JUSTICE, WASHINGTON, D.C. 20530

All parties required to be served have been servec.

DATED: June 2, 1983

ROGER SULLIVAN
Attorney at Law
Counsel for Petitioner

STATE OF CALIFORNIA
SS
COUNTY OF SANTA CRUZ

On this the 2nd day of June, 1983, before me, BONNIE P. LAIRD, the undersigned Notary Public, personally appeared ROGER SULLIVAN, personally known to me and whose name is subscribed to the within instrument and acknowledged that he executed it.

BONNIE P. LAIRD
Notary Public

APPENDIX A

UNITED STATES DISTRICT COURT

FOR THE

UNITED STATES OF AMERICA vs. PREMISES KNOWN AS 12110 Blake Lane San Jose, CA	DOCKET NO. 5-81 CASE NO. 459 SEARCH WARRANT

To Nordin F. Blacker, 151 W. St. John St., San Jose, CA

Affidavit(s) having been made before me by that he has reason to believe that on the premises known as 12110 Blake Lane, San Jose, CA, a single-story, brown, wood-framed single family dwelling, with 12110 Blake Lane printed on the front of the residence in white numerals and letters. Also to include ground and out buildings and vehicles under the control of the residents of 12110 Blake Lane. in the State and Northern District of California there is now being concealed certain property,

namely Methamphetamine; chemicals and controlled substances and laboratory equipment used in the operation of a clandestine laboratory; narcotics paraphernalia; U.S. currency; correspondence and business records relating to the manufacture and distribution of methamphetamine; any and all indicia of residence and other documentation and objects likely to bear latent fingerprints which are evidence of knowing possession of contraband enumerated above which are fruits and instrumentalities of a crime and evidence of violation of Title 21 USC 841(a)(1), 846 and 881.

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above described and that grounds for application for issuance

of the search warrant exist as stated in the supporting affidavit(s).

You are hereby commanded to search within a period of---------- (not to exceed 10 days) the person or place named for the property specified, serving this warrant and making the search

(in the daytime (6:00 a.m. to 10:00) (p.m.) at any time in the day or) (night*)

and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant and bring the property before ---------- ----------as required by law.

Dated this 7 day of October, 1981

/s/ Nordin Blacker
Judge (Federal or State Court of Record or Federal Magistrate

UNITED STATES DISTRICT COURT

FOR THE

UNITED STATES OF AMERICA	DOCKET NO. 5-81 CASE NO. 459
vs.	AFFIDAVIT FOR
PREMISES KNOWN AS: 12110 Blake Lane San Jose, CA	SEARCH WARRANT

BEFORE NORDIN F. BLACKER, 151 W. St. John St., San Jose, CA

The undersigned being duly sworn deposes and says: That he has reason to believe that (on the premises known as) 12110 Blake Lane, San Jose, CA, a single-story, brown, wood-framed single family dwelling, with 12110 Blake Lane printed on the front of the residence in white numerals and letters. Also to include grounds, any out buildings and vehicles under the control of the residents of 12110 Blake Lane. in the State and Northern District of California there is now being concealed

certain property, namely Metamphetamine; chemicals and controlled substances and laboratory equipment used in the operation of a clandestine laboratory; narcotics paraphernalia; U.S. currency; correspondence and business records relating to the manufacture and distribution of methamphetamine; any and all indicia of residence and other documentation and objects likely to bear latent fingerprints which are evidence of knowing possession of contraband enumerated above which are fruits and instrumentalities of a crime and evidence of violation of Title 21 USC 841(a)(1), 846 & 881.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

See attached affidavit by Task Force Agent Jeff Ouimet.

Task Force Agent

Sworn to before me, and subscribed in my presence, , 19

Judge or Federal Magistrate

CITY OF SAN JOSE, COUNTY OF SANTA CLARA

STATE AND NORTHERN DISTRICT OF CALIFORNIA

AFFIDAVIT

1. Your affiant is Jeff Ouimet, a police officer for the City of San Jose, California, having been so employed since January 1976. Your affiant is currently assigned to the Federal Drug Task Force at San Jose, CA, and has been so assigned since October of 1980. Your affiant was previously assigned to the San Jose Police Department Narcotics Division from February 1978 to October 1980. During your affiant's experience as a narcotics investigator, your affiant has become knowledgeable in the methods used to manufacture methamphetamine.

2. On 10/2/81, your affiant spoke to Officer David Luna who is currently assigned to the San Jose Police Department Narcotics Division. Officer Luna told

your affiant that he spoke to Officer Dennis Luca of the San Jose Police Department on 9/29/81. Officer Luca told Officer Luna that he had received information given voluntarily from an untested informant. The informant shall hereafter be referred to as "C." "X's" identity should remain anonymous since "X's" future usefulness to law enforcement would be hindered if "X" was identified. Also, "X's" life would be in danger if "X" was identified. "X" told Officer Luca that on 9/25/81 "X" went to a house on Cherry Avenue in San Jose, CA, just down from Almaden Expressway, with another party to purchase methamphetamine. "X" said the house was down the street from the Robertsville Car Wash and was on the same side of the street as the car wash. "X" said the house is in an orchard area and has an American flag on a pole next to the house. "X" said

that the party "X" was with went into the house. "X" waited in a car in the driveway. The party "X" was with came back out of the house with a plastic baggie of white powder. "X" said the baggie contained approximately one ounce of methamphetamine. "X" knows what methamphetamine is since "X" has seen and used it in the past. "X" also told Officer Luca that the party that was with "X" told "X" that methamphetamine was currently being manufactured in the house. "X" also said that a person by the name of "PAT" lived in the house.

3. Officer Luna told your affiant that on 9/29/81, Officer Luna drove to the area previously described by "X." Officer Luna located the house that was described by "X." It had a flag pole next to the house. Officer Luna identified the house as being 12110 Blake Lane, San Jose, CA. Officer Luna observed a 1972 green Volvo

station wagon in the driveway of 12110 Blake Lane. The vehicle had California license plate number 854 PZD. Officer Luna checked with the California Department of Motor Vehicles and learned that the vehicle was registered to Martin and Suzanne S. JARRETT, P.O. Box 1363, Santa Cruz, CA. Officer Luna told your affiant that he called Deputy Steve Robbins, Santa Cruz County Sheriffs Office, Narcotics Division, in an effort to identify Martin or Suzanne JARRETT. Deputy Robbins told Officer Luna that he felt the two people were in fact Kenneth MARTIN and Suzanne JARRETT. Deputy Robbins said that Kenneth MARTIN has used an alias of Martin JARRETT and that Suzanne JARRETT is the wife of Kenneth MARTIN. Deputy Robbins also said that MARTIN had been previously convicted for manufacturing methamphetamine.

4. On 10/5/81, your affiant checked with the United States Postal Service and found that P.O. Box 1363, Santa Cruz, CA is subscribed to Kenneth MARTIN and Suzanne MARTIN. Your affiant has also viewed a criminal record from the Federal Bureau of Investigation on Kenneth MARTIN and discovered that MARTIN was convicted of manufacturing and distributing methamphetamine.

5. On 10/5/81, your affiant learned from Pacific Telephone Co. that telephone number (408) 448-3310 is subscribed to Peter JENSEN at 12110 Blake Lane, San Jose, CA. Further, your affiant has learned from the Santa Clara County Criminal Records Dept. that Peter JENSEN is an alias for Patrick ANDREW. Your affiant has viewed a copy of ANDREW'S arrest record and discovered that he has been convicted of drug charges.

6. On 10/6/81, your affiant spoke to Officer Bob Meheula who works for the San Jose Police Department. Officer Meheula told your affiant that he lives in the vicinity of 12110 Blake Lane, San Jose, CA. Officer Meheula told your affiant that he once smelled an odor that resembled ether. This was during the first week in September 1981. Officer Meheula said he smelled this particular odor while outside in the street in front of 12110 Blake Lane. Officer Meheula said he was not sure if it was ether he smelled, but that the odor was similar to the medicinal type of odor found in a hospital. Officer Meheula also told your affiant that over the past several months, he has never seen the drapes open at 12110 Blake Lane.

7. On 10/6/81, your affiant spoke to Jim Hagey who is a chemist at the Drug Enforcement Administration Laboratory in

San Francisco, CA. Hagey said that an odor of ether is commonly present during the manufacturing process. Hagey also told your affiant that manufacturers of methamphetamine frequently vent the odors caused by the process to an area outside of the building being used. Hagey said this is because ether is highly flammable and can cause unconsciousness at high concentration.

8. On 10/6/81, your affiant personally viewed the residence at 12110 Blake Lane, San Jose, CA and found it to be as previously described. Your affiant also observed the aforementioned vehicle (California license 854-PZD) in the driveway of 12110 Blake Lane. Your affiant also observed a black object protruding from the roof at the rear of the residence. The object appeared to be made of metal, cylindrical in shape, approximately 1 to

1 1/2 feet in diameter, and approximately 6 feet high. This object appeared much larger than pipes and vents that are commonly seen on the roofs of residences.

9. Based on your affiant's experience and training, your affiant knows that clandestine laboratories are often inoperative for periods of time. However, your affiant knows that often laboratory equipment, chemicals, traces of controlled substances, and evidence of illicit manufacturing remain on the premises where the laboratory has been. Further, your affiant knows that often the laboratory is only inoperative during that period of time in which the laboratory operators are obtaining all of the necessary chemicals needed for the illicit manufacturing process. Further, it has been your affiant's experience that illicit laboratory operators and drug dealers frequently

keep drugs, chemicals, U.S. currency, and other paraphernalia in yards, out buildings and vehicles. Also, it has been your affiant's experience that illicit laboratory operators and drug dealers frequently keep records and documents of drug sales and transactions and large sums of U.S. currency on their premises. Frequently this U.S. currency has been proceeds of illicit drug transactions and also will be used to purchase chemicals for future illicit manufacturing.

10. Your affiant believes, based on the aforementioned facts, there is probable cause to believe that evidence of the previously-mentioned crimes will be found at 12110 Blake Lane, San Jose, CA.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. PATRICK K. ANDREW, Defendant.	CR 81-0409 SW (SJ)

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

This action came before the court on defendant Patrick K. Andrew's motion to suppress evidence seized during the execution of a search warrant at 12110 Blake Lane, San Jose, California on June 2, 1980. Upon reviewing the briefs and taking oral argument, the court concludes that the government had probable cause to conduct a search. Defendant's motion to suppress is therefore denied.

I. THE STANDARD OF REVIEW

In reviewing a magistrate's issuance

of a search warrant upon a finding of probable cause, the court must grant that determination great deference. United States v. Johnson, 641 F.2d 652, 658 (9th Cir, 1981). The reviewing court must allow the magistrate to make a determination based on common-sense. United States v. Ventresca, 380 U.S. 102, 108 (1965). The policy of deference exists in order to encourage police officers to seek warrants. Id. at 108-09

II. THE INFORMANT

Defendant's focus their attack on the affidavit of San Jose City Police Officer, Jeff Ouimet. This affidavit describes the events leading up to the search in dispute. It begins with the untested informant's tip to Officer David Luna, a member of the San Jose Police Department Narcotics Division. Probable cause which is based in part on an infor-

mant's statements must meet the two-prong test set forth in Aguilar v. Texas, 378 U.S. 108 (1964).

First, the affidavit must describe the underlying circumstances from which the informant derived their suspicions of criminal activity. This "knowledge" prong is generally fulfilled by the informant's person observations. United States v. Schauble, 647 F.2d 113, 116 (10th Cir. 1981). Here the informant did not personally witness any incriminating activity.[1] Nor does the affidavit contain any other direct indication of the basis of his knowledge. The first prong has therefore not been directly satisfied.

The second prong requires the affiant to set forth an explicit indication of the informant's credibility. Veracity is commonly shown directly by the informant's record of accurate tips. United

States v. Whitney, 633 F.2d 902, 906 (9th Cir. 1980). This affidavit fails to provide any assurance that the informant is reliable. On the contrary, it specifically admits that the tipster was "untested".

The government's failure to directly fulfill the Aguilar requirements is not dispositive however. An informant's tip may satisfy the "knowledge" prong by supplying sufficient detail to allow a magistrate to infer an adequate basis of knowledge. Spinelli v. United States, 393 U.S. 410, 416 (1969). Likewise, the "credibility" prong can also be satisfied indirectly by independent corroboration of the information supplied by the informant. Id. at 417; United States v. Johnson, 641 F.3d 652, 658-59 (9th Cir. 1981). What is unclear, particularly in the wake of United States v. Harris, 403 U.S. 573

(1971), is precisely what detail is required to show knowledge and the extent of independent corroboration necessary to prove credibility.[2]

In the instant case, the informant told Officer Luna that he and a friend had gone to a house where his friend had purchased methamphetamines. He described the location of the house and said that it had a flagpole in front of it. In addition, his friend told him that a man named "Pat" was in the house. Officer Ouimet independently investigated these and other facts supplied him by Officer Luna. He discovered that: (1) the car in the driveway was registered under an alias used by Martin Jarrett, a man with prior convictions for manufacturing and selling methamphetamines; (2) the phone was listed under an alias used by defendant Patrick Andrew, who also had prior

drug convictions; (3) an officer who lives in the area reported smelling an ether-like odor in the area[3]; (4) the same officer stated that the drapes were always drawn at the residence in question; (5) the house has a large vent protruding from the roof.[4]

It is the court's view that both the innocent and incriminating elements of the informant's tip were sufficiently corroborated by Officer Ouimet's investigation. The house was located in the general area described by the informant. The people using the residence had histories of drug convictions. There was a pervasive odor associated with the manu= facture of methamphetamines.

Finally, the detail with which the location of the house was described was sufficient to show that the informant had an adequate basis of knowledge. He told

Officer Luna that the house was in an orchard area, near a Robertsville Car Wash on Cherry Street.[5]

III. PROBABLE CAUSE

Defendant next asserts that with or without the informant's tip, no probable cause existed to search the premises. Probable cause exists to conduct a search if a reasonably prudent person, based on the facts and circumstances known by the officer, would be justified in concluding that the items sought are connected with criminal activity and that they will be found in the place to be searched. Carrol v. United States, 267 U.S. 132, 158-59; (1925); United States v. Allen, 644 F.2d 749, 751-52 (9th Cir. 1980).

At the time the warrant issued, Officer Ouimet was aware of the location of the house, the types of people currently using the residence, the existence of

smells associated with the manufacture of narcotics, vents used to expel noxious fumes produced during the manufacture of methamphetamines and a sale of methamphetamines. The court finds that, when taken together, these facts constitute sufficient cause for a search warrant to issue.

DATED: -2 APR 1982

/s/ Spencer M. Williams
UNITED STATES DISTRICT JUDGE

FOOTNOTES

1/ The affidavit states that, "X" waited in a car in the driveway. The party 'X' was with came back out of the house with a plastic baggie of white powder. 'X' said that the baggie contained approximately one ounce of methamphetamine."

2/ There is additional confusion surrounding the type of information which needs to be corroborated. The issue finds

its origins in the apparent contradiction in the Spinelli Court's language and their reliance on Draper v. United States, 358 U.S. 307 (1950). The Court's language indicates that the corroborated activity must be incriminatory or at a minimum, not innocuous. The facts relied upon in Draper however, were, by themselves, innocent.

3/ An ether-like odor is commonly present during the manufacturing process of methamphetamines.

4/ Large vents are necessary to release the noxious gases produced during the manufacturing process.

5/ The affidavit states, "'X' told Officer Luna that on 9/25/81 'X' went to a house on Cherry Avenue in San Jose, CA, just down from Almaden Expressway, with another party to purchase methamphetamine. 'X' said that the house was down the

street from the Robertsville Car Wash and was on the same side of the street as the car wash. 'X' said the house was in an orchard area and has an American flag pole next to the house." Although the house was actually located on Blake Street the other details supplied make it clear that this was an unintentionally mistaken detail.

Cr 81-0409 SW United States v. Patrick K. Andrew

Gregory Ward, Esq.
Assist. U.S. Attorney
San Jose Office

Roger Sullivan, Esq.
555 Soquel Avenue, Suite 330
Santa Cruz, CA 95062

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	NO. 82-1539
	)	
vs.	)	DC# CR 81-409-
	)	1-SMW Northern
PATRICK K. ANDREW,	)	California
	)	
Defendant-Appellant.	)	MEMORANDUM
	)	

Appeal from the United States District Court for the Northern District of California District Judge Spencer M. Williams, Presiding

Submitted March 1, 1983*

Before: WRIGHT, CHOY, AND SKOPIL, Circuit Judges:

Andrew challenges the sufficiency of a search warrant affidavit that led to the seizure at his home of controlled

*Submitted without oral argument by unanimous agreement of the panel.

substances, laboratory equipment, and firearms. The district court denied his motion to suppress the seized material and, after a trial to the court, found him guilty on all counts.

Andrew argues that the information in the affidavit did not support the magistrate's finding of probable cause. He asserts that key information, the location of the house to be searched, was not supported by the "four corners" of the affidavit, as required by United States v. Anderson, 453 F.2d 174, 177 (9th Cir. 1971).

The affidavit was based largely on the tip of a confidential informant. Although the informant stated that he went with a friend to a house on Cherry Avenue to buy drugs, the affidavit said that police had determined that the suspect home was on Blake Lane. The affidavit

did not indicate how police so concluded.

The affidavit's narration of the informant's tip satisfied the "four corners" test. The informant stated that the house was located in an orchard area off the Almaden expressway near the Robertsville car wash. He said that the house was on the same side of the street as the car wash, and had an American flag on a pole next to the house. This sufficiently pinpointed the location, regardless of the incorrect street designation.

Andrew contends also that the affidavit failed to meet the probable cause requirements established by Aguilar v. Texas, 378 U.S. 108 (1963), and Spinelli v. United States, 393 U.S. 410 (1968). Under Aguilar, the affidavit must provide information showing: (1) the reliability of the informant's information; and (2) the informant's credibility. 378 U.S. at

114.

This affidavit did not directly satisfy the Aguilar elements of reliability and credibility. The informant saw the methamphetamine after his friend had bought it, but he had no direct knowledge that the drug came from the house. Cf. United States v. Lefkowitz, 618 F.2d 1313, 1316 (9th Cir.), Cert.denied, 449 U.S. 824 (1980). The informant was untested and could not establish credibility through a history of accurate tips. Cf. United States v. Whitney, 633 F.2d 902, 906 (9th Cir. 1980), cert.denied, 450 U.S. 1004 (1981).

If reliability and credibility are lacking, Spinelli requires that the tip must provide information in sufficient detail, corroborated by independent investigation, to provide a basis for a finding of probable cause. 393 U.S. at 416-18;

see also United States v. Johnson, 641 F.2d 652, 658-59 (9th Cir. 1981). Andrew argues that the affidavit did not satisfy that test because the details confirmed by police were "minor and innocuous." See United States v. Larkin, 510 F.2d 13, 15 (9th Cir. 1974).

The details as to the house's location, which were corroborated, were innocuous and not indicative of criminal activity. The informant's tip included also the information that "Pat" lived there, and it specified the date of the transaction. The informant stated that as a user of methamphetamine, he recognized the white powder his friend brought from "Pat's" home.

According to the affidavit, independent police investigation showed that the phone at the Blake Lane house was listed under a known alias of Patrick Andrew,

who had prior drug convictions. Police learned also that a car in the house's driveway was registered to a known alias of Kenneth Martin, also previously convicted of manufacturing methamphetamine.

Methamphetamine manufacture requires the use of ether, the odor of which commonly accompanies the manufacturing process. The affidavit showed that a police officer smelled ether outside the house several weeks before the drug transaction took place.

Ether must be vented because of its flammable character and because at high concentrations it causes unconsciousness. The officer observed that the house had an unusually large vent on the roof.

Although the smell of ether, without more, does not establish probable cause, United States v. Tate, et al., 694 F.2d 1217, 1221 (9th Cir. 1982), the affidavit

provided many other incriminating details. These were corroborated or independently discovered by the police and justified issuance of the search warrant.

The judgment is affirmed. The mandate will issue now. The district judge may choose to reconsider the appellant's release on bail.

No. 82-2007

In the Supreme Court of the United States

OCTOBER TERM, 1983

PATRICK KELLY ANDREW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

BRENDA GRUSS
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the totality of the circumstances set forth in the affidavit in support of the search warrant for petitioner's residence provided probable cause for issuance of the warrant.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-2007

PATRICK KELLY ANDREW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. C1-C7) is reported at 705 F.2d 468 (table).

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1983. The petition for a writ of certiorari was filed on May 23, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Northern District of California, petitioner was convicted on one count of manufacturing methamphetamine, and one count of possession with intent to manufacture methamphetamine, in violation of 21 U.S.C. 841(a)(1); one count of carrying a firearm during the commission of a felony, in violation of 18 U.S.C. (Supp. V)

924(c); and one count of possession of a firearm after a previous felony conviction, in violation of 18 U.S.C. App. 1202(a)(1). Petitioner was sentenced to concurrent five-year terms on counts one and two; a consecutive three-year term on count three; a concurrent two-year term on count four; and a two-year special parole term on counts one and two. The court of appeals affirmed petitioner's conviction (Pet. App. C7).

1. On October 7, 1981, Federal Magistrate Nordin F. Blacker of the Northern District of California issued a warrant authorizing the search of petitioner's residence at 12110 Blake Lane, San Jose, California (Pet. App. A1-A3). Execution of the search warrant on October 8, 1981, resulted in the seizure of laboratory equipment, methamphetamine (a schedule II controlled substance), and two firearms (*id.* at C1-C2).

Prior to trial, petitioner moved to suppress the seized evidence on the ground that the affidavit (Pet. App. A7-A15) in support of the search warrant, sworn to by San Jose City police officer Jeff Ouimet, failed to provide probable cause for the search. According to the affidavit, an untested informant told San Jose City police officer Dennis Luca that on September 25, 1981, the informant, a user of methamphetamine, went with a companion to buy methamphetamine at a house on Cherry Avenue in San Jose. The house was in an orchard area; near the Almaden Expressway; on the same side of the street as the Robertsville Car Wash; and had an American flag on a pole outside. The informant's companion went into the house and returned with a plastic baggie containing an ounce of methamphetamine. The companion told the informant that methamphetamine was currently being manufactured in the house. According to the informant, a person named "Pat" lived in the house. *Id.* at A8-A9.

Officer Luca relayed the information provided by the informant to San Jose City police officer David Luna, who investigated the informant's tip. Officer Luna located a house matching the description given by the informant at 12110 Blake Lane in San Jose. Officer Luna did a registration check on a car parked in the driveway and found that the car was registered to a known alias of a man previously convicted of manufacturing methamphetamine. Pet. App. A9-A11.

Officer Luna reported his findings to Officer Ouimet, who continued the investigation. Officer Ouimet spoke with a San Jose City police officer who lived in the neighborhood of the residence. That officer had noticed a medicinal odor that resembled ether outside the house and had observed that the drapes of the house had not been opened for several months. Officer Ouimet learned that the odor of ether is often present during the manufacture of methamphetamine and that manufacturers often vent the processing odors outside. Pet. App. A12-A13.

Officer Ouimet then viewed for himself the 12110 Blake Lane residence and confirmed Officer Luna's conclusion that although the informant had been mistaken about the address of the house, the house on Blake Lane matched the informant's description in all other respects (Pet. App. A13). Officer Ouimet also saw a black cylindrical object, larger than most pipes or vents, protruding from the roof of the house (*id.* at A13-A14). Based on these facts, Officer Ouimet sought and obtained the search warrant that led to petitioner's arrest.

2. The district court denied petitioner's motion to suppress evidence seized during execution of the search warrant at petitioner's residence (Pet. App. B1-B10), and the court of appeals affirmed (*id.* at C1-C7). The court of appeals held that the informant's tip satisfied the "four corners" test of *United States* v. *Anderson*, 453 F.2d 174,

177 (9th Cir. 1971), and that the affidavit contained sufficient incriminating information corroborated or independently discovered by the police to satisfy the probable cause requirements of *Aguilar* v. *Texas*, 378 U.S. 108 (1964), and *Spinelli* v. *United States*, 393 U.S. 410 (1969).

ARGUMENT

Petitioner contends (Pet. 9) that the affidavit did not provide probable cause for the search of his home because the affidavit met neither the "four corners" test of *Anderson* nor the "two-pronged" *Aguilar-Spinelli* test. Both the district court and the court of appeals rejected petitioner's contentions. Further review of the sufficiency of the affidavit by this Court is unwarranted, particularly because this Court's decision in *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), undercuts petitioner's heavy reliance on the "two-pronged" *Aguilar-Spinelli* test.

1. Petitioner contends (Pet. 9-17) that the affidavit violated the Ninth Circuit's "four corners" rule[1] because it did not contain the information necessary to conclude that the events the informant said took place on Cherry Avenue in fact occurred on Blake Lane. The "four corners" rule, however, does not preclude the magistrate from drawing reasonable inferences from the facts contained in an affidavit for a search warrant. See *Illinois* v. *Gates*, *supra*, slip op. 25. Since it is highly improbable that two houses in San Jose both bear the same relationship to the Almaden Expressway, the Robertsville Car Wash, and the orchard area, and also have flagpoles, the affidavit fully supports the inference

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[1]In *United States* v. *Anderson*, 453 F.2d 174, 177 (9th Cir. 1971), the court held that "all facts and circumstances relied upon for the issuance of a federal warrant [must] be found in the written affidavit." In *Anderson*, the government conceded that the affidavit itself failed to establish probable cause, but asked the court to hold the deficiencies cured by the affiant's supplemental oral statements (*id.* at 175-176).

that the informant simply confused Blake Lane and Cherry Avenue. Unlike *Anderson*, therefore, resort to information not contained in the affidavit is unnecessary. As the district court held, "the other details supplied [by the informant] make it clear that [the erroneous street] was an unintentionally mistaken detail" (Pet. App. B10).[2]

2. Petitioner asserts (Pet. 20) that [t]rying to assess the reliability of the [informant's] information * * * is like trying to get a firm grip on jello" and further contends (*id.* at 22) that the informant had no personal knowledge of the facts described in the affidavit.[3] Petitioner then addresses each item of corroborative evidence provided by the police and argues that each item alone is too minor or innocuous to justify the magistrate's probable cause determination (*id.* at 26-38).

In *Gates*, this Court rejected the notion that the informant's "reliability" and "basis of knowledge" are two elements of independent status. Instead, the Court deemed the informant's "reliability" and "basis of knowledge" relevant considerations in a "totality of circumstances" analysis, in which deficiencies in one or even both factors may be compensated for by other indicia of reliability. *Illinois* v. *Gates*, *supra*, slip op. 18. Contrary to petitioner's assertion (Pet.

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[2]Even if the magistrate had consulted a map and thereby discovered that Blake Lane adjoins Cherry Avenue (see Pet. 11, 14), there would have been no violation of the "four corners" rule. *Anderson* did not deal with facts subject to judicial notice, such as the location of streets on a map. See Fed. R. Evid. 201. In any event, the inferences reasonably drawn from the affidavit itself, discussed above, make resort to extrinsic materials totally unnecessary.

[3]Petitioner's complaint (Pet. 10-11) about the hearsay nature of much of the informant's information is undercut by his own admission (*id.* at 10) that an affidavit relying on hearsay "is not to be deemed insufficient on that score, so long as a substantial basis for crediting the hearsay is presented." *Jones* v. *United States*, 362 U.S. 257, 269 (1960). As described above, the affidavit in this case meets that test.

25), the informant's report was sufficiently detailed to exclude the possibility that his tip regarding the drug sale was only casual rumor or speculation. Although the informant did not claim to have witnessed a methamphetamine transaction inside the house, he gave a first-hand description of the house where the transaction took place, including the name of a local business establishment (the Robertsville Car Wash); the topography around the house (orchard area); the house's unique characteristics (the flag pole); and the name of a resident ("Pat").[4] The informant also stated that he saw his companion return from the house with the drug, described the drug's appearance and packaging, and explained that he knew it was methamphetamine because he was a user.

In addition, police investigation provided corroborative evidence that more than made up for any lack of first-hand knowledge or other indicia of reliability on the part of the informant. The car parked in the driveway of the house was registered to the known alias of a convicted methamphetamine manufacturer. The telephone at the house was listed to a known alias of the petitioner, who had prior drug convictions. An officer had smelled ether, a substance used in the manufacture of methamphetamine, outside the house several weeks before the transaction. Ether must be vented outside, and an officer had observed a large cylindrical pipe or vent protruding from the roof of the house. While each of these factors standing alone might not have been sufficient to establish probable cause, see, *e.g., Beck* v. *Ohio,* 379 U.S. 89, 97 (1964), *United States* v. *Tate,* 694 F.2d 1217, 1221 (9th Cir. 1982), petition for cert. pending, No. 83-24, the relevant inquiry is "not whether particular [corroborating] conduct is 'innocent' or 'guilty,' but the degree of

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[4]The fact that the informant made a mistake about the street name only highlights the significance of the other details, since the officers were able to locate the place described from the other information provided.

suspicion that attaches to particular types of non-criminal acts." *Illinois* v. *Gates, supra,* slip op. 29 n.13. Taken together, the various corroborating factors in this case compelled the magistrate's "practical, common-sense decision [that], given all the circumstances set forth in the affidavit before him * * *, there [was] a fair probability that contraband or evidence of a crime [would] be found" at petitioner's residence. Slip op. 23.

In *Gates,* this Court reemphasized its teaching that reviewing courts " 'should not invalidate * * * warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner.' " *Illinois* v. *Gates, supra,* slip op. 21, quoting *United States* v. *Ventresca,* 380 U.S. 102, 109 (1965). The lower courts' decisions in this case demonstrate that petitioner's arguments had little merit even under the regime of *Aguilar* and *Spinelli.* Application to this case of the more practical, factual approach of *Gates* shows that petitioner's contentions are altogether without merit and that the magistrate's issuance of the search warrant was fully justified.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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